IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 19, 2009 Session

RUSSELL COPE v. TENNESSEE CIVIL SERVICE COMMISSION

Appeal from the Chancery Court for Davidson County
No. 07-142-I Claudia Bonnyman, Chancellor

No. M2008-01229-COA-R3-CV - Filed June 10, 2009

An employee of the Tennessee Highway Patrol was terminated based on the employee's handling of a traffic stop five and a half years prior. The employee received written notice that his superiors were recommending his termination and a pre-termination opportunity to respond to the charges against him; the Commissioner of the Department of Safety agreed with the recommendation and terminated the employee's employment. The employee filed a post-termination grievance and received a hearing before the Commissioner in which the employee's termination was upheld. The employee appealed to the Tennessee Civil Service Commission and a contested case hearing was held before an administrative law judge sitting for the Commission. The administrative law judge upheld the termination and the employee filed a petition for judicial review. The trial court affirmed the decision of the Commission and the employee appeals. The employee's central challenge is that the nearly six year delay between the incident and the disciplinary action taken by the Department violated his due process rights. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and FRANK G. CLEMENT, JR., J. joined.

W. Gary Blackburn, Nashville, Tennessee, for the appellant, Russell Cope.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Eugenie B. Whitesell, Senior Counsel, Office of the Attorney General, Nashville, for the appellee, Tennessee Civil Service Commission.

OPINION

I. BACKGROUND

The Appellant, Russell Cope, was employed by the Tennessee Highway Patrol ("THP"), a division of the Department of Safety ("Department"), from 1971 until his employment was

terminated in 2006, except for a brief period of retirement in the early 1990s.[1] In January 2006, Mr. Cope was terminated by the Department for violations of Department of Personnel Rules and Department of Safety General Orders stemming from his handling of a May 30, 2000 traffic stop.

On December 22, 2005, Mr. Cope was placed on administrative leave with pay pending an internal investigation into his alleged unprofessional conduct. On January 11, 2006, he received a letter informing him that, based upon the results of an investigation by the Internal Affairs Division into his "unprofessional conduct and other violations" during a May 30, 2000 traffic stop the THP was recommending to Department of Safety Commissioner Gerald Nicely that he be terminated. The notice described Mr. Cope's conduct during the traffic stop as rude, disrespectful and unprofessional.[2] The notice stated that "this is not the first disciplinary action taken against you by the Department. A review of the attached cases . . . filed against you was important in determining this disciplinary action."[3] The notice informed Mr. Cope that termination was being recommended for violation of the following:

> 1. Department of Personnel Rule 1120-10.06(2): Negligence in the Performance of Duties;
> 2. Department of Personnel Rule 1120-10.06(4): Failure to Maintain Satisfactory and Harmonious Working Relationships with the Public and Fellow Employees;
> 3. Department of Personnel Rule 1120-10.06(8): Gross misconduct or conduct unbecoming an employee in the State service;
> 4. Department of Personnel Rule 1120-10.06(24): For the good of the service as outlined in T.C.A. 8-30-326;
> 5. Department of Safety, General Order 501, IV, A: Officer/Violator Relations

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[1] In 1990, Mr. Cope resigned from the Highway Patrol in the middle of an investigation against him for harassment and threats. Mr. Cope was re-employed in 1993.

[2] The May 30, 2000 traffic stop, which was recorded by a video recorder in Mr. Cope's patrol car, began when Mr. Cope came across three vehicles stopped on the side of Interstate 65 in Giles County, Tennessee. Mr. Cope had previously received a "be on the look-out" dispatch regarding a citizen's report that two vehicles were seen driving down Interstate 65 throwing items between them. Mr. Cope assumed the stopped vehicles had engaged in the reported activity even though he had no personal knowledge to that effect and despite statements by the vehicle occupants to the contrary. The video recording of the incident showed that Mr. Cope failed to identify himself upon approaching the vehicles and spoke to the vehicle occupants in a hostile and accusatory manner. Mr. Cope questioned the drivers of two of the vehicles and became frustrated by one of the passengers who stepped out of a car to talk with a passenger in another car. Mr. Cope instructed this person to return to his car, which he did. Later, Mr. Cope walked past the individual's door and attempted to slam it shut. The man's leg was in the way and then Mr. Cope kicked his leg inside the vehicle. This event prompted most of the other passengers to get out of their respective cars and yell at Mr. Cope for assaulting the young man; Mr. Cope yelled back. One of the drivers intervened and calmed the situation; Mr. Cope then radioed for officer assistance. The incident concluded with Mr. Cope arresting one of the drivers for underage drinking and the man whom he had kicked for disorderly conduct.

[3] An attachment to the notice listed 50 complaints between 1988 and 2005 filed by citizens or other troopers against Mr. Cope and the resulting disciplinary action, if any. The majority of the complaints related to rude, improper, and unprofessional conduct by Mr. Cope.

6. Department of Safety, General Order 501, IV, C: Once communication begins, the interaction between the officer and the violator has been activated.
1. Be absolutely certain the observations of the traffic violation were accurate,
2. Present a professional image in dress, grooming, language bearing and emotional stability,
3. Identify yourself and greet the violator with an appropriate title and in a courteous manner.

A pre-termination hearing was held on January 18, 2006, that resulted in Commissioner Nicely approving Mr. Cope's termination. On January 24, 2006, the Department issued a notice of termination to Mr. Cope.

On February 3, 2006, Mr. Cope filed a grievance regarding his termination, which, under the rules, was appealed directly to the Commissioner. The Commissioner reaffirmed the decision to terminate Mr. Cope's employment following a Step IV grievance hearing conducted on March 8, 2006. On March 27, 2006, Mr. Cope timely appealed the Commissioner's decision to the Tennessee Civil Service Commission (the "Commission") and a Step V contested case hearing was held on August 15, 2006, before the Honorable Randall LaFevor, administrative law judge, sitting for the Commission. The ALJ found that Mr. Cope had engaged in conduct prohibited by the Department of Personnel Rules 1120-10-.06(2), (4), (8), and (24) and had failed to follow Department of Safety General Order 501 IV, Sections A and C; the ALJ concluded that termination was appropriate based on Mr. Cope's "conduct on May 30, 2000 and the ongoing pattern of inappropriate conduct exhibited throughout his tenure as a State Trooper." The ALJ's initial order was entered on November 8, 2006, and became the final order of the Commission fifteen days after entry as Mr. Cope did not file a petition for appeal or for reconsideration to the Administrative Procedures Division of the Office of the Secretary of State.

Mr. Cope filed a petition in the Chancery Court for Davidson County for judicial review of the Commission's decision. On May 27, 2008, the trial court affirmed the Commission's final order. Mr. Cope then filed timely notice of appeal to this Court. Mr. Cope contends that the five and a half year delay in sanctioning him for the May 30, 2000 incident deprived him of due process of law. Alternatively, he contends that he had previously been disciplined for the May 30, 2000 incident and that he could not be disciplined twice for the same act. Finally, Mr. Cope contends that the Commission should not have upheld his termination based on the ground "for the good of the service."

II. STANDARD OF REVIEW

The Tennessee Uniform Administrative Procedures Act ("UAPA") governs our review of this matter. Tenn. Code Ann. §§ 4-5-322(a)(1) (2005); 8-30-328(d) (2005). "When reviewing a trial court's review of an administrative agency's decision, this Court essentially is to determine 'whether or not the trial court properly applied the . . . standard of review' found at [Tennessee Code

Annotated] § 4-5-322(h)." *Jones v. Bureau of TennCare*, 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002) (quoting *Papachristou v. Univ. of Tenn.*, 29 S.W.3d 487, 490 (Tenn. Ct. App. 2000)).

Judicial review of an administrative agency's decision is confined to the record made before the agency. *Metropolitan Gov't of Nashville v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977). The reviewing court may affirm the agency's decision or remand the case for further proceedings. Tenn. Code Ann. § 4-5-322(h) (2005). The court may also reverse or modify the decision of the agency if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5)(A) Unsupported by evidence which is both substantial and material in the light of the entire record.

Tenn. Code Ann. § 4-5-322(h). "In determining the substantiality of the evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Tenn. Code Ann. § 4-5-322(h)(5)(A). The UAPA requires that: "[n]o agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors that affect the merits of such decision." Tenn. Code Ann. § 4-5-322(i) (2005).

III. DISCUSSION

A. Due Process

Mr. Cope contends that the Commission's decision should be reversed because he was "denied due process in being disciplined for a six-year-old event." He does not take issue with the sufficiency of the notice or hearings he received once action was taken by the Department, but rather asserts that the delay between the occurrence of the event and the bringing of charges was too distant to afford him an opportunity to be heard at a "meaningful time" and in a "meaningful manner" and, consequently, deprived him of due process.

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 8 of the Tennessee Constitution provide procedural protections against government infringement on significant property and liberty interests. A state civil servant like Mr. Cope has a property interest in his or her continued employment. Tenn. Code Ann. § 8-30-331(a) (2005). Accordingly, no action which deprives the employee of that right will become effective until minimum due process is provided. *Id.*

Several Tennessee statutes establish procedures designed to meet these due process requirements. Tenn. Code Ann. § 8-30-331, which requires an employee receive written notice of charges and an opportunity to respond to these charges before any action is taken, addresses the constitutional requirement of due process afforded to a Tennessee civil servant before disciplinary action is taken against the employee. *See Cleveland Bd of Educ. v. Loudermill*, 470 U.S. 532, 547, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (requiring pre-termination opportunity to respond to charges). Tenn. Code Ann. § 8-30-328, which provides for a contested case hearing before an administrative law judge designated by the Civil Service Commission, addresses the grievance procedures an employee may pursue after the disciplinary action is enforced. *See Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270, 273 (6th Cir. 1985) (setting forth the minimum requirements of a "meaningful" post-termination hearing such as attendance at the hearing, assistance of counsel, opportunity to call witnesses and produce evidence on one's behalf and to know and have an opportunity to challenge the adversary's evidence).

The concepts of fundamental fairness and substantial justice embodied in due process means that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Accordingly, "due process is flexible and calls for such procedural protections as the particular situation demands." *Case v. Shelby County Civil Service Merit Bd*, 98 S.W.3d 167, 172 (Tenn. Ct. App. 2002) perm. app. denied (Dec. 9, 2002) (citing *Matthews*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). In *Case*, the court explained that "[i]n *Matthews*, the U.S. Supreme Court identified three factors to be considered in determining what procedural protections are required in a specific situation: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* (citing *Matthews*, 424 U.S. at 335); *see also Arnett v. Kennedy*, 416 U.S. 134, 167, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 263-266, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Mr. Cope does not take issue with the due process procedures provided him once disciplinary action was taken, but rather complains that the delay between the occurrence of the event and the bringing of charges deprived him of due process of law. There are no statutes or cases imposing a statute of limitations for taking disciplinary action against a civil service employee in Tennessee. Moreover, neither the Department of Personnel Rules nor the Department of Safety's disciplinary regulations require that disciplinary action be taken within a specified time. *See* Tenn. Comp. R. & Regs. 1120-10-.01 *et seq*.; Department of Safety General Order 216-2 (Aug. 15, 1999), V, A, 1 (stating merely that "[w]hen disciplinary action is required[,] the supervisor should administer

disciplinary action promptly[4] and impartially"). The question thus arises in this case: what process was due Mr. Cope?

In applying the *Matthews* factors to the case before us, we find that the private interest affected is Mr. Cope's continued employment with the THP, which he had held for nearly three decades. The primary governmental interest is public safety; this is multi-faceted. Because law enforcement officers interact with the public on a daily basis and are entrusted with the safety of citizens of Tennessee, they must have the public's respect to function effectively.[5] Similarly, the reliability and fairness of our justice system begins with the public's confidence that law enforcement officers will uphold proper standards of performance. The State of Tennessee, therefore, has a legitimate interest in retaining law enforcement officers who behave appropriately with the public. When there are improprieties in the THP, the State also has a legitimate interest in regaining the public's confidence and in creating an internal culture of responsibility, professionalism and accountability by disciplining officers whose conduct falls below proper standards.

In balancing these two interests, we must also analyze whether the delay here increased the likelihood of an erroneous deprivation of Mr. Cope's employment. Citing several Tennessee cases that have held "due process mandates that a classified civil service employee whose employment may be terminated for cause must be afforded the opportunity to confront and cross-examine the witnesses against him at the post-termination hearing where the facts giving rise to termination are in dispute or where the severity of the discipline is challenged," *Kirkwood v. Shelby County Gov't*, No. W2005-00769-COA-R9-CV, 2006 WL 889184, at *9 (Tenn. Ct. App. Apr. 6, 2006); *Case*, 98 S.W.2d at 175, Mr. Cope contends that the nearly six year delay between the incident and his termination "frustrated" his ability to defend himself because he was unable to locate two witnesses who were present during the incident. Mr. Cope asserts that "no fair assessment of his behavior could be made without the context of the event being offered through live testimony."

Generally, delay between an incident and adjudication of a claim or charge based on the incident can increase the risk of an erroneous decision because the passage of time can seriously impair the quality and quantity of evidence whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *See U.S. v. Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979); *U.S. v. Marion*, 404 U.S. 307, 322, n. 14, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). In this case, the fact that Mr. Cope's conduct was preserved on videotape somewhat diminishes these typical problems associated with the passage of time. In fact, other than

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[4] We note that the Department does not require prompt disciplinary action, but merely establishes promptness as a goal. By encouraging supervisors to take action "promptly," the Department not only seeks to increase the likelihood of improvement in an employee's behavior, but also achieve a level of fairness and consistency in the disciplinary process.

[5] As noted by Mr. Cope's supervisor, Lieutenant Sellers, the THP's "reputation, I believe, was tarnished by Trooper Cope in the short time that he was stationed [in my county], through his continued unprofessional behavior."

the two witnesses Mr. Cope was unable to locate,[6] neither of whom had filed a complaint against him, he offers no details as to how the delay prejudiced his case before the Commission. Mr. Cope contends that, had these two witnesses filed a complaint against him in 2000, they would be the principal witnesses against him and that, at his hearing, he had a due process right to confront and cross-examine them. This contention, however, is a *non sequitur*. These two witnesses to the event did not testify; consequently, Mr. Cope was not deprived of the opportunity to confront and cross-examine them. Counsel for Mr. Cope addressed the absence of the witnesses at the hearing as follows:

> This whole matter comes to rest, and two of these individuals, the two witnesses named and represented on these returned subpoenas, were placed under arrest and were convicted in the Circuit Court, I presume, in Giles County, and that was the end of it.

To the extent Mr. Cope claims that these witnesses were essential to his defense, the record does not show that he sought a continuance or recess to secure their attendance or made an offer of proof of their anticipated testimony. The Department, not these two citizens, brought the current charges against Mr. Cope who fully participated in the termination process and had every opportunity to challenge the evidence against him, including cross-examining several of his superiors. Accordingly, we affirm the trial court's determination that the Department's delay in taking disciplinary action against Mr. Cope five and a half years after the underlying incident did not deprive him of due process.[7]

B. Previous Discipline for the May 30, 2000 traffic stop

Mr. Cope contends that he was previously disciplined for the way he handled the May 30, 2000 traffic stop in July 2000 and, therefore, cannot now be disciplined again for the same event. Mr. Cope points to a July 10, 2000 memorandum written by Sergeant, now Lieutenant, Wayne Sellers, Mr. Cope's supervisor at the time. The Commission found that the July 10 memo made no reference to the May 30 incident and that there was "no evidence in the record establishing that [Mr. Cope] has been previously disciplined for his egregious behavior on [May 30, 2000]." The trial court affirmed the Commission's finding.

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[6] Mr. Cope obtained the issuance of subpoenas for the two individuals he arrested during the May 30, 2000 traffic stop; the subpoenas, which did not have an issuance date, were returned on August 13, 2006, two days before the contested case hearing, stating "unable to find anybody home or mail inbox[;] return unserved."

[7] Our conclusion that Mr. Cope's due process rights were not violated by the delay here is limited to the facts of this case, where extensive evidence was preserved and available for review and where the civil service employee was a law enforcement officer who routinely interacted with the public and, thus, was responsible for upholding the public's confidence that law enforcement will protect the citizens of Tennessee fairly and reliably. We make no determination about whether the delay at issue in another case or for a civil service worker who is not in such a position of public trust might compel another conclusion.

While we have found no Tennessee law, rule or regulation that prohibits a civil service employee from being disciplined twice for the same event, principles of fundamental fairness and the fact that a civil service employee like Mr. Cope can only be terminated for cause, *see* Tenn. Comp. R. & Regs. 1120-10-.02, demonstrates to us that such an employee should not be punished twice for the same conduct. Such a conclusion is supported by several other jurisdictions. *See Ladnier v. City of Biloxi*, 749 So.2d 139 (Miss. Ct. App. 1999) (ruling that if a civil servant was disciplined once for certain misconduct, it follows that good cause would not then exist to sustain the employee's later discharge for the same event); *Lundy v. Univ. of New Orleans*, 728 So.2d 927 (La. Ct. App. 1 Cir. 1999) (holding "each occasion of discipline by the appointing authority must be based upon previously undisciplined behavior, because an employee cannot be twice disciplined for a single dereliction"); *State Dep't. of Transp. v. State Career Serv. Comm'n*, 366 So.2d 473 (Fla. Dist. Ct. App. 1979) (ruling that disciplinary action administered to a public employee may not be increased at a later date nor may an agency discipline an employee twice for the same offense); *Rochon v. Rodriguez, Superintendent of Police, City of Chicago*, 293 Ill.App.3d 952, 689 N.E.2d 288, 292 (Ill.App. 1 Dist. 1997) (holding that "a probationary employee cannot be dismissed for a reason that has been the basis of a previous disciplinary sanction").

The Tennessee Personnel Department Rules and the Department of Safety General Order 216-2 on disciplinary action have adopted a progressive disciplinary scheme which begins at the lowest level with an oral warning, then a written warning or reprimand, followed by suspension without pay, and finally dismissal, transfer or demotion. Tenn. Comp. R. & Regs. § 1120-10-.07; Department of Safety General Order 216-2 (Aug. 15, 1999), V. Department of Safety General Order 216-2 contains additional guidance on pre-disciplinary counseling. The General Order explains that a supervisor's first step in the disciplinary process should be counseling, which does not require documentation and is to be considered "lenient disciplinary action." *Id.* Counseling involves a discussion between the employee and his or her first line supervisor; the purpose of which should be to reach an understanding of the causes for an offense and to impress upon the employee the need for corrective action. *Id.* Mr. Cope contends that the July 10 memo written by Lieutenant Sellers and signed by Mr. Cope constitutes disciplinary action for the May 30 incident.

The Department of Personnel Rules explain that an oral warning consists of the supervisor meeting privately with the employee to:

> (a) Review with the employee exactly what is expected on the job and why.
> (b) Explain to the employee how he has not met requirements and why present conduct or performance is unacceptable.
> (c) Allow the employee to give reasons for his actions or failure.
> (d) Make suggestions for correction.
> (e) Record the date of the discussion and other necessary information for future reference.

Tenn. Comp. R. & Regs. § 1120-10-.07(2). The Department of Safety General Order 216-2 further explains that a written follow-up to an oral warning is not necessary, but may be done; if an oral

warning is followed up in writing such document should not be considered a "written warning" and should not become part of the employee's official personnel file. Department of Safety General Order 216-2 (Aug. 15, 1999), V, D.

> A written warning consists of the supervisor meeting with the employee to:
>
> (a) Review the points covered in the oral warning, if an oral warning(s) was administered. The employee will be told that a significant change in his present conduct or performance must be made.
> (b) Tell the employee he will receive a letter covering the significant points of the discussion to include:
> 1. What has been expected and how these expectations have not been met.
> 2. Suggestions for improvement.
> 3. Indication that failure to improve will lead to further disciplinary action.
> (c) Review with the organizational unit head the contents of the letter prior to its delivery to the employee by the supervisor
> (d) A copy of the written warning may be placed in the employee's official personnel file in the agency personnel office at the discretion of the appointing authority.

Tenn. Comp. R. & Regs. § 1120-10-.07(3).

The July 10, 2000 memo that Mr. Cope points to as evidence that he was previously disciplined for the May 30, 2000 traffic stop is a hand-written document that begins by referencing five occasions between March 1999 and July 2000 in which Lieutenant Sellers sat down with Mr. Cope and discussed his "disrespectful conduct during traffic stops." The memo explains that each time Lieutenant Sellers brought the issue to Mr. Cope's attention Mr. Cope assured Lieutenant Sellers that he would improve. The memo stated:

> Each time we discuss the problem, you improve for a very short period, then get progressiv[e]ly worse. Your unprofessional attitude and defiance of direct orders is more evident than ever.
>
> Upon viewing your video tapes, your conduct is as bad if not worse than during our first discussion on 03/29/[99]. I have done my very best to see you improve in this area[;] however[,] it is obvious to me my efforts have fallen on deaf ears.
>
> Please be advised that in the future, anytime I observe unprofessional conduct which reflects negatively on our Department, I will request a review of your conduct by Lt[.] Brown and Capt[.] Thompson. This is regardless of whether a complaint has been filed or not.
>
> Should this occur I will present documentation of the numerous times we have discussed this problem and proof you have not complied.
>
> As in the past, I will do anything to assist you in achieving this, however the real effort must come from you[.]

Above Mr. Cope's signature, the memo states: "I have read the above, I fully understand it and am aware of the consequences if I do not improve." Lieutenant Sellers placed the memo in Mr. Cope's local personnel file in Giles County, but did not discuss it with his superiors or place a copy in Mr. Cope's official personnel file.

Lieutenant Sellers wrote a memorandum on January 16, 2006, at Internal Affairs' request stating that neither his discussion with Mr. Cope nor the memo were designed to discipline Mr. Cope specifically for the May 30, 2000 traffic stop. Lieutenant Sellers testified during the contested case hearing that he did not recommend disciplinary action be taken against Mr. Cope in 2000 for the May 30, 2000 traffic stop because no official complaint had been filed and that he had forwarded the videotape to his superiors such that he "felt like they was aware of it [a]nd it was their place to act then, and not mine."

Mr. Cope's testimony confirmed Lieutenant Sellers' testimony. Mr. Cope testified that he had never been confronted with the May 30, 2000 videotape, asked to explain his behavior during the traffic stop or disciplined for his handling of the traffic stop before December 2005. Mr. Cope also testified about his understanding of what happened to the videotape after May 30, 2000 as follows:

> It was brought up to my supervisor shortly after the stop. I later found out that it was brought up later in a complaint by Trooper, former Trooper Carol. It was brought before Colonel Scott. It was reviewed by all those parties, Internal Affairs, and Colonel Scott found that there was no justification for any further action in it, and it was laid to rest. The last [next] time I heard about it was back in [December] when I was brought up, and done an Internal Affairs Investigation.

We agree with the trial court in upholding the Commission's determination that Mr. Cope had not previously been disciplined for his handling of the May 30, 2000 traffic stop. The July 10, 2000 memo written by Lieutenant Sellers makes no specific references to the May 30, 2000 traffic stop, rather it was intended to help Mr. Cope identify problematic patterns of behavior in his traffic stops over the course of a year or more and alert Mr. Cope to the fact that if such behavior continued it could adversely impact his career with the THP. There is nothing in Mr. Cope's disciplinary record that references the May 30, 2000 traffic stop and both Lieutenant Sellers and Mr. Cope testified that Mr. Cope was not counseled, warned or otherwise disciplined for the May 30, 2000 traffic stop and nothing in the July 10, 2000 memo contradicts their testimony.

C. Termination Based on "For the Good of the Service"

Mr. Cope also raises on appeal the following issue: "whether a State employee may be terminated 'for the good of the service' because of publicity generated by the State regarding the charges it has brought." Mr. Cope does not contend the Commission's factual findings were unsupported by substantial and material evidence. Instead, Mr. Cope asserts that, because the

Commission's final order mentioned the effect of publicity as being one reason to support Mr. Cope's termination "for the good of the service," the publicity around the release of the May 30, 2000 videotape was the sole basis for finding Mr. Cope's termination was "for the good of the service." Mr. Cope contends that, consequently, the Commission's termination "for the good of the service" was contrary to Tenn. Code Ann. § 8-30-326(b) and beyond the disciplinary authority of the Department.

An employee may be terminated "when the [appointing] authority considers that the good of the service will be served thereby." Tenn. Code Ann. § 8-30-326(a) (2005). However, termination based on "for the good of the service" requires a Notice of Termination to state in detail how the service will benefit when an employee is dismissed "for the good of the service." Tenn. Code Ann. § 8-30-326(b) (2005).

The January 11, 2006 pre-termination letter notifying Mr. Cope that termination was being recommended included as a ground for termination "for the good of the service" and explained:

> [t]he manner in which you handled this situation was irresponsible, unprofessional and unnecessary. The reactions of the parties involved were totally precipitated by your actions. You have not only seriously damaged your individual credibility as a State Trooper but also the credibility of all law enforcement officers charged with dealing with the public.

The January 24, 2006 termination letter contained this same statement, which we find stated with sufficient specificity the reasons why Mr. Cope's conduct did disservice to the reputation of the THP and the Department. The letter makes no mention of any publicity about the May 30, 2000 videotape or that such publicity was the reason why "for the good of the service" was included as a ground for termination; consequently, we find no error in the trial court's determination that the Commission properly upheld Mr. Cope's termination based on the ground "for the good of the service."

IV. CONCLUSION

We are mindful that the standard of review for the trial court as well as this Court is a limited one. An appellant such as Mr. Cope may prevail only if he establishes that the agency's decision violates constitutional or statutory provisions, exceeds its statutory authority, was made upon unlawful procedure, was arbitrary and capricious, or was unsupported by the evidence. *See* Tenn. Code Ann. § 4-5-322(h). Mr. Cope has established none of the constitutional or statutory bases for modification or reversal of the Commission's decision to uphold Mr. Cope's termination from the Department of Safety.

Since no disciplinary action was taken against Mr. Cope for his handling of the May 30, 2000 traffic stop prior to the current charges, the Department was within its authority to seek disciplinary action against Mr. Cope for behavior that fell below the standards of performance set forth in the

Department of Personnel Rules and the Department Safety General Orders. While delay between an incident and corrective action should be minimized, delay in and of itself does not violate an employee's constitutional right to due process. Because of the preservation of evidence by videotape and a fully developed record, the delay in the present case did not violate Mr. Cope's right to due process of law; consequently, we find the trial court did not err in affirming the action of the Commission.

Costs of the appeal are taxed to the Appellant, Russell Cope, for which execution may issue, if necessary.

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RICHARD H. DINKINS, JUDGE